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A CORRECTION.

To the Editors of the Harvard Law Review:

Since the publication of my article in the last number of the REVIEW, I have learned that the article in 2 Law Quarterly Review, 506, referred to by me in note 5, page 273, and described as "presumably from the pen of Sir Frederick Pollock," was not, in fact, written by him. I therefore desire to correct the statement.

Very truly yours,

WILLIAM SCHOFIELD.

BOSTON, Feb. 12, 1890.

THE case of *The Metropolitan Exhibition Company* v. *Ward* is a single combat between two of the chiefs in the greater battle between our base-ball capitalists and our base-ball players. The plaintiff company or its predecessors and the defendant on the 23d of April, 1889, entered into a contract by which the defendant agreed to play ball with the New York Base-Ball Club from 1st April to 31st October, 1889, on a certain salary. The plaintiff company had also by this agreement the right to "reserve" the defendant for the season of 1890 at a salary of not less than three thousand dollars, and in a club not to exceed fourteen members in number at the time of the reserve. The further right was given to the plaintiff company of terminating all obligations on this contract by ten days' notice given at any time. The services thus promised for the year 1889 have been performed by the defendant, and the money for them has been paid. The defendant has been reserved by the plaintiff company for the year 1890, but has been actively employed in the work of other base-ball clubs The plaintiff company then files this bill to restrain the defendant from playing base-ball or rendering services of any kind for any one until 31st October, 1890, and a motion is made to enjoin the defendant until the hearing of the cause. The main question raised by the suit is, therefore, what is the legal effect of the "reserve" secured to the plaintiff company by the agreement of 23d April, 1889?

Judge O'Brien refuses the preliminary injunction on the ground that a final judgment may be had very soon, and in the mean time the plaintiff can suffer no irreparable injury. Some comments are also made on the merits of the case and on the possibility of the plaintiff's final success.[1]

It seems to us that the plaintiff company has a very good chance of obtaining a permanent injunction on the hearing of the cause. The plain construction of the word "reserve" is this: it is the right to keep, to hold for future use. Let us suppose that there was no stipulation except this reserve, that is, nothing was said about salary and other terms of reserve. Then no one could doubt that the plaintiff would get the relief he asks, for the right to reserve, if translated into terms of the defendant's duty, means that the defendant has bound himself absolutely by a negative covenant to play ball with no one but the plaintiff company. It is to be observed that this is not a positive promise to play with the plaintiff company, but only a negative promise to play with no one else. The plaintiff company has the absolute refusal, so to speak, of the defendant's services. It is the case of a negative unilateral contract, for the breach of which damages at law would be clearly inadequate, and which has been already broken or is actually threatened. If the reserve were unconditional, therefore, the merits would be clearly on the side of the plaintiff company.

What new element is introduced by the insertion of the provisos that the defendant shall be reserved, 1, at a salary of not less than three thousand dollars, and 2, in a club of not more than fourteen men at the time of the reserve? In the consideration of this question we may disregard the second proviso altogether, because it was a fact the existence of which was a condition precedent to the exercise of the power to reserve, and must be presumed now that the reserve has been made. But the contract provides that it shall be considered a condition precedent to the right to reserve that the defendant shall be reserved at a salary of three thousand dollars at least. In other words, by the exercise of the reserve the plaintiff company has become bound to pay the defendant a certain salary if he chooses to play ball with them. If the plaintiff company reserves the defendant, it must also employ him. But, again, it is to be observed that the defendant assumes no obligation to play with the plaintiff company; the defendant is given an offer which is to remain open as long as the reserve holds him from other employment. Thus, when the season opens the defendant is at liberty to retire from the diamond altogether and enter some other occupation, *e. g.*, the legal profession, for which in this case the defendant happens to be trained; or he may demand employment of the plaintiff company at a salary of three thousand dollars, and he may sue them if he is not employed or paid. But the fact that the defendant has this right against the plaintiff company can in no way diminish his obligation towards the plaintiff company. The promises of the plaintiff company and of the defendant do not, therefore, constitute mutual and dependent conditions, but they are independent and absolute. Hence the defendant is still bound by an absolute negative promise to play ball with no one but the plaintiff company, and this promise is one of the kind that equity usually enforces. We can answer, then, that the provisos make no difference in the legal effect of the reserve.

[1] New York Law Journal, 29th Jan., 1890.

Nor is it an objection that the plaintiff company may terminate all rights and obligations by ten days' notice. By coming into equity the plaintiff company must be taken to have waived this right forever, because the prayer for relief and the retention of a right of termination are two acts totally inconsistent with one another. This waiver can be made effective by the terms of the decree.

The final judgment of the Supreme Court of New York on this bill will be watched for with interest.

THE editors and publishers of newspapers about Boston have agreed to submit a petition to the General Court of Massachusetts, praying for a relaxation of the law of newspaper libel in favor of the newspapers, and they embody their prayer in the following proposed enactment; "No action or prosecution shall be maintained for the publication of any matter of legitimate interest to the public, if such publication is made without malice, and if the author or publisher thereof causes effectual retraction or correction to be made of anything untrue or mistaken in such publication as soon as practicable after being requested so to do by any person aggrieved by the original publication." On behalf of such an enactment it is urged that "it is contrary to all principles of justice to assume, as the present law does, that a publisher is guilty until he proves himself innocent; that such an assumption is directly the reverse of the commonly accepted axioms of law."

The consummation hoped for in the enactment of this new law has long since been realized in England. The statute 6 and 7 Vict. c. 96, s. 2 (1843), provided "that in an action for a libel contained in any public newspaper or other periodical publication, it shall be competent to the defendant to plead that such libel was inserted in such newspaper or other periodical publication without actual malice and without gross negligence, and that before the commencement of the action, or at the earliest opportunity afterwards, he inserted in such newspaper or other periodical publication a full apology for the said libel," etc. Some such law was before the New York Legislature a year ago,[1] and we believe the question is not entirely new in the Massachusetts General Court. Minnesota has such a law. Michigan had a similar statute, but it was declared unconstitutional because it failed to provide a proper remedy for a wrong, and because it was class legislation.[2]

It is obvious that there is no such crying injustice in the present law as the authors of this petition seem to imagine. One who publishes a libel is held liable for damages because of the injury done, and not because of any malice, as the newspapers are told every day. But granting that the changes proposed are desirable from the point of view of expediency and policy, we think it clearly within the power of the Legislature to pass such an act. Such a law denies no one the "equal protection of the laws," because the law applies to a class. Moreover, within reasonable limits the Legislature must judge what is or is not a proper remedy for a given wrong.[3]

It would be extremely interesting to see some English testimony on the practical working of their law (Lord Campbell's Act), although English experience would be no sure guide for us.

[1] 39 Alb. L. J. p. 101, see also, pp. 181, 201.
[2] *Park* v. *Detroit Free Press Co.*, 40 N. W. Rep. 731 (Mich.).
[3] *Allen* v. *Pioneer-Press Co.*, 40 Minn. 117.